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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A.D. 1967

No. ~~1445~~ 213

WILLIAM CAHN, owner of one hundred per cent (100%) of the capital stock of ASPIC INVESTMENTS CORPORATION,

Petitioner,

vs.

JOHN NICHOLAS, Trustee,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WALTERS, MOORE & COSTANZO
and RICHARD R. BOOTH
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Miami, Florida 33132

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner respectfully shows:

I. Summary Statement of the Matter Involved

On February 23, 1966, the Successor-Trustees of AMERICAN BONDED MORTGAGE CO., ASPIC INVESTMENTS CORPORATION and FLORA SUN CORPORATION, Chapter 10 debtors, JOHN NICHOLAS, Respondent herein, hereinafter referred to as the Respondent, filed his petition for consolidation of the three

proceedings (R. p 1) "for the purposes of administration" (R. p 3).

On March 11, 1966, the HONORABLE EMETT C. CHOATE, United States District Judge, entered his Order of Consolidation (R. pp 3, 4) providing that the three Chapter 10 proceedings be "consolidated for the purpose of administration" (R. p 4).

At the hearing of March 11, 1966, on the Respondent's petition for consolidation, aforesaid, Milton Grusmark, Esq., attorney for William Cahn, the Petitioner herein, hereinafter referred to as the Petitioner, said:

> "The only point I make, sir, and I won't belabor it, that the record indicates that Aspic alone is solvent."

In response to this comment by Petitioner's counsel the Court said (R. p 44):

> "**** But for the purpose of administration we have always considered them the same thing [referring to the three Chapter 10 corporations, aforesaid] ever since we started, and I will grant that [referring to the Respondent's petition for consolidation, aforesaid]. Mind you, that doesn't give Aspic's money to creditors of the other corporations [American Bonded and Flora Sun] necessarily."

Mr. Grusmark then said (R. p 44):

"If I understand the Court's ruling, this is strictly for the purpose of administration."

The Court then elaborated as follows: (R. p 44):

"That's right, administration, litigation and hearings. Rather than having three hearings, if we have anything to hear on this case we can have one because we are only dealing with one man, but creditors in that manner are quite different; they may have other things to say."

Thereafter, on March 29, 1966, William M. Manker, Esq., one of Respondent's attorneys, filed his Petition to Reimburse Advanced Expenses under the style of the Aspic Chapter 10, No. 180-62-M-Bk-ECC (R. p 5) and attached to the same as "Exhibit A" (R. p 6A) a ledger sheet labeled "American Bonded Mortgage".

On April 18, 1966, hearing was held on said petition (R. p 45 et seq) and the matter was brought to the Court's attention by Petitioner's attorney (R. pp 45, 46) as follows:

"**** Your Honor, the exhibit attached to this petition appears to be a ledger sheet of some sort labeled 'American Bonded Mortgage Co.' Some of the items, individual items, for example, 1964, June 10th, says, 'Telephone, Flora Sun'; and under that also June 10th, 'Telephone, Aspic Investments.'"

As a result of said hearing the Court entered its order granting the petition (R. pp 6, 7), without allocat-

ing the expenses among the three Chapter 10 corporations.

Subsequently, on May 9, 1966, the Court heard various petitions for fees and reimbursement of expenses incurred in the administration of the three Chapter 10 proceedings (R. p 49 et seq).

At said hearing Petitioner's attorney made the following objection (R. p 56):

> "Speaking on behalf of William Cahn, the one hundred per cent stockholder of Aspic Investments Corporation, I would like to state an objection into the record of any funds of the Aspic Investments Corporation being paid in discharge of any obligation of any of the other two cases which have been consolidated with Aspic for purposes of administration. I don't think it would be proper to pay the assets of Aspic for the obligations of any other estates."

Three orders were entered on that hearing. (R. pp 7, 8, 9). None of these orders allocated among the three Chapter 10 proceedings any of the fees or expenses authorized by the said orders.

It wasn't until June 15, 1966, that an attempt was made to secure a ruling from the Court that the three Chapter 10 corporations in question were alter egos of each other. On that date the Respondent filed his Petition to Declare Debtor Corporations to be the Alter Ego of Each Other and to be the Alter Ego of Stockholder. (R. p 10 et seq).

Appeal was subsequently filed in the United States Court of Appeals for the Fifth Circuit, briefs were submitted and oral argument was had on the following question suggested by the Petitioner:

> Where three Chapter 10 reorganization proceedings which were filed on different dates have been consolidated for purposes of administration, does the United States District Judge have the authority to grant petitions for compensation and for reimbursement of expenses earned or incurred in one or more of the several Chapter 10 reorganization proceedings without requiring that such fees and reimbursements as granted be paid only from the funds of the debtor involved in the proceedings in which earned or incurred?

On April 13, 1967, a Per Curiam order affirming the action of the Lower Court was rendered in the United States Court of Appeals for the Fifth Circuit. This order has not yet been reported; a copy of the same is appended.

II. Jurisdictional Statement

The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 of Title 28 of the United States Code. The date of the judgment sought to be reviewed by certiorari is April 13, 1967, and the date of this application for certiorari is May 29 1967.

III. Question Presented

The question herein presented is as has been stated above, to wit: Where three Chapter 10

reorganization proceedings which were filed on different dates have been consolidated for purposes of administration, does the United States District Judge have the authority to grant petitions for compensation and for reimbursement of expenses earned or incurred in one or more of the several Chapter 10 reorganization proceedings without requiring that such fees and reimbursements as granted be paid only from the funds of the debtor involved in the proceedings in which earned or incurred?

IV. Reasons Relied on for the Allowance of the Writ

A. The decision of said Court of Appeals affirming the action of the United States District Court is in conflict with the decision of the Court of Appeals for the Second Circuit on the same subject in the case of **In re Realty Associates Security Corporation**, 156 F. 2d 480, affirming the District Court for the Eastern District of New York, 65 F. Supp. 116.

B. The decision herein sought to be reviewed is also contrary to the provisions of Title 11 USCA §102(a)(1), which is made applicable to Chapter 10 proceedings by Title 11 USCA §501, such provisions reading as follows:

§102(a)(1)

"The actual and necessary costs and expenses incurred by officers, other than referees, in the administration of estates shall, except where other provisions are made for their payment,

be reported in detail under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred."

And §502 (in pertinent part):

"The provisions of Chapters 1 to 7, inclusive, of this title shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter ***."

C. The decision in question is also contrary to the provisions of Title 11, §641 of the United States Code, which provides in pertinent part as follows:

"The judge may allow reimbursement for proper costs and expenses incurred by the petitioning creditors and reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in a proceeding under this chapter —

****

(3) by the trustee and other officers, and the attorneys for any of them,

(4) by the attorney for the debtor; and

(5) by the attorney for the petitioning creditors.

****"

WHEREFORE, your petitioner prays that a writ of certiorari issue under the Seal of this Court directed to the Court of Appeals for the Fifth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Appeals Court had in the case numbered and entitled on its docket, No. 24071, William Cahn, owner of one hundred percent (100%) of the capital stock of Aspic Investments Corporation, Appellant, vs. John Nicholas, Trustee, Appellee, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Appeals Court be reversed by the Court, and for such further relief as to this Court may seem proper.

DATED May 29, 1967.

WALTERS, MOORE & COSTANZO
and RICHARD R. BOOTH,
Attorneys for Petitioner,
1008 Ainsley Building,
Miami, Florida 33132.

By Richard R. Booth
Richard R. Booth

APPENDIX

[JUDGMENT SOUGHT TO BE REVIEWED]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24071

WILLIAM CAHN, owner of one hundred percent (100%) of the capital stock of ASPIC INVESTMENTS CORPORATION,

Appellant,

versus

JOHN NICHOLAS, Trustee,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 13, 1967.)

Before TUTTLE, Chief Judge, AINSWORTH, Circuit Judge, and FULTON, District Judge.

PER CURIAM: The judgment is AFFIRMED.